Nos. 10-238 and 10-239

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

"Every dollar I spend over the threshold starts feeding the alligator trying to eat me." JA364. That's the reality of Arizona's matching funds system as reported by traditional candidates in the peer-reviewed article, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, PS: Political Science & Politics (2008), 41:527-532. JA365. By defeating the purpose of candidates engaging in campaign fundraising and spending – which is to win an election – Arizona's system silences core political speech without ever having to resort to the crude method of direct censorship. If the Court were to allow Arizona's system to stand, it would establish the precedent that the government is free to destroy the value of campaign speech by lavishing subsidies on opposing candidates for the explicit purpose of equalizing electoral opportunities.

On June 8, 2010, the Court was right to take the extraordinary step of stopping Arizona from paying matching campaign subsidies to publicly-financed candidates when competing privately-financed candidates and independent groups raised or spent campaign money above a "spending limit." This dramatic action was justified because Arizona's system obviously contravened the Court's 2008 decision in *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), that the government violates the First Amendment when it imposes competitive disadvantages on candidates as a condition and consequence of exercising their First Amendment rights. Arizona's system also threatened the core First Amendment principle, most recently

applied in *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010), that the government must not meddle in the open marketplace of ideas to equalize electoral opportunities. Simply put, Arizona's "experiment" with triggered matching funds is a Frankenstein's monster grafted together from discarded bits and pieces of discredited regulatory regimes. The experiment needs to end.

REBUTTAL OF RESPONDENTS' FACTUAL ALLEGATIONS

1. *Arizona's Matching Funds System Has Deterred Campaign Speech.* Respondents inexplicably assert that Petitioners have failed to advance evidence showing that triggered matching funds deter campaign speech. CEI Br. 6, 19-20; CCEC Br. 11. Respondents should know better. They previously admitted that "political campaign consultants in Arizona routinely advise their traditional candidate clients to minimize the competitive disadvantage of Matching Funds by minimizing fundraising or spending to minimize matching funds and/or to alter their mode of fundraising and spending in ways that minimize the benefit of matching funds." JA927-28(¶101). Moreover, Petitioners, at least one Respondent, Petitioners' experts Drs. Osborn and Primo, Respondent's expert Dr. Green, and *ten* nonparty witnesses – including the current Arizona Attorney General – have all testified to the chilling effects that result from the threat of triggered matching funds; including fear of

triggering matching funds, hesitancy before engaging in campaign fundraising or spending, delay in campaign spending until the last possible minute, cancellation of specific campaign promotions, and refraining from campaign fundraising or spending altogether. McComish Br. 30-36; 10-239PA237-54, 296; JA1003-04; Record 13-4(4:25-28, 5-7:1-2), 357(52:19-25, 53:1-23). This testimony was corroborated by the peer-reviewed political science article, *Gaming Arizona*, which reported the results of survey responses from 69 candidates (40% traditional), including follow-up interviews with 16 candidates (25% traditional). JA363-72, 377.

2. *Dr. Green's Unscientific Testimony Disproves Nothing.* Dr. Green's quantitative theory that a deterrent effect from matching funds could only be proven if campaign spending were clustered around the spending limits that trigger matching funds is fatally flawed for at least four reasons. CEI Br. 7, 18; CCEC Br. 39-40. First, Dr. Green's clustering theory disregards the fact that the deterrent effect from matching funds typically causes candidates to delay or completely refrain from campaign fundraising or spending. Spending that *never happens* obviously cannot be measured by looking for clusters of *reported* spending around spending limits. Likewise, the fact that traditional candidates often delay spending until the eve of an election and then launch a barrage of spending well over the spending limit will not be revealed in the form of spending clusters around spending limits. Dr. Green's clustering theory thus

cannot measure much of the deterrent effect of matching funds.

Second, Dr. Green's opinion falsely assumes that the reported date of campaign spending reflects the actual timing of campaign finance decisions. In fact, there is no necessary connection between the *reporting* of fundraising and expenditures and the *decisions* that prompt them. The practices of Petitioner Bouie's campaign consultant, for example, often resulted in erratic reporting of campaign expenditures during the 2008 election cycle. 10-239PA299-300.

Third, Dr. Green's clustering theory does not grapple with the fact that independent expenditures are treated as if they were expenditures of traditional candidates, which means that matching funds are triggered when the sum of independent expenditures and candidate spending exceeds the relevant spending limit. A.R.S. § 16-952(C). Traditional candidates, who anticipate matching funds being triggered by independent expenditures, may refrain from campaign spending well before it could cluster around the relevant spending limit. As explained by Petitioner Bouie in the midst of the 2008 election cycle, "I feel compelled to conserve money for damage-control in anticipation of poorly-conceived independent expenditures backfiring after they triggered matching funds." Record 13-4(4:20-23).

Fourth, Dr. Green's quantitative theory is just not probative because it falsely assumes that speech regulations must measurably stifle speech to burden

speech. Even if traditional candidates courageously disregarded the obvious disadvantage of triggering government subsidies to their political opponents, just as Jack Davis disregarded the Millionaire's Amendment, that fact would not lift the burden imposed on them by the threat of matching funds. *Cf. Davis*, 554 U.S. at 732.

Dr. Green's failure to consider the foregoing facts in developing and testing his "clustering" theory reflects his deliberately uninformed methodology. JA969-70. He admitted not reading the Clean Elections Act. Record 357(16:25-17:1-2). He admitted having no experience in Arizona campaign consulting. *Id.* (7:2-19). He admitted ignorance of Arizona campaign tactics and strategies. *Id.* (9:10-14, 9:23-25, 10:1-19, 11:8-13). He did not read the depositions of fact witnesses. *Id.* (18:9-25, 19:1-22, 20:1-25, 21:3-25, 22:2-8, 29:13-25, 30:1-25). And he considered only the evidence that was given to him by defense counsel. *Id.* (21:3-25, 22:2-8).[1]

3. *Matching Funds Have Not Increased Free Speech*. To their credit, Respondents have abandoned their false district court testimony that independent

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[1] The district court's decision granting Petitioners' motion for summary judgment should be construed as impliedly striking Dr. Green's testimony. McComish Br. 86 n.6. Such relief is fairly included in the questions presented to the Court because an assessment of the admissibility of evidence is "a predicate" to their "intelligent resolution." *Cf. Ohio v. Robinette*, 519 U.S. 33, 38 (1996).

expenditures increased 3,300% between 1998 and 2006, which resulted from Respondents and their purported experts overlooking the fact that the electronic records they relied upon were obviously incomplete. 10-239PA278-86. But in now claiming that independent expenditures increased by "a massive 253%" between 1998 and 2006, Respondents neglect to mention that an entire banker's box of original campaign finance reports from 1998, which likely contained evidence of independent expenditures, was never produced by the Secretary of State. *Compare* CEI Br. 18, 58, *with* 10-239PA284 n.1. Consequently, all one can truthfully say is, *if* independent expenditures increased at all, they increased *no more* than 253%. 10-239PA279, 285-86. But this finding must kept in context: Arizona's increase in population of 32.37% between 1998 and 2006 was nearly *four times* that of the nation's population increase. *Id.* As a result, Arizona's increase in independent expenditures lagged per capita growth in national political action committee expenditures by *at least 33%*. *Id.*

Similarly, Respondents have laudably stepped away from their false district court candidate spending estimates, which were overstated "nearly 13 times" in one case and in another case "nearly 33 times the actual amount." JA917. But Respondents still misleadingly claim, "overall candidate expenditures increased between 29 and 67 percent and average candidate expenditures increased between 12 and 40 percent; general election spending by the top 10 percent of candidates increased by 16 percent." CEI

Br. 58. Respondents' first two representations lump together spending by traditional and participating candidates. JA916-17. And the last representation evades the implications of Arizona's 32.37% population growth between 1998 and 2006. 10-239PA285.

The truth is that average spending by traditional candidates in constant dollars between 1998 and 2006 has either lagged population growth or actually shrunk in absolute terms. As compared to population growth of 32.37%, an analysis of traditional candidate spending reveals that in constant dollars: a) average primary election spending by major party candidates, whose spending was in the top 10%, decreased 2.3% ($63,928.21 to $62,453.74); b) average general election spending by major party candidates, whose spending was in the top 10%, increased 15.7% ($40,354.05 to $46,685.08); and c) average total spending by major party candidates increased 24.4% between 1998 and 2006 ($23,164.37 to $28,806.84). 10-239PA290.

SUMMARY OF ARGUMENT

1. Respondents have disregarded the main lessons of *Citizens United* and *Davis*. The Court has repeatedly underscored the overriding importance of fully protecting unfettered and uninhibited political speech from government interference. *Citizens United*, 130 S.Ct. at 896; *Davis*, 554 U.S. at 739-40. This means individuals in a free society cannot be forced to

choose between silence or exercising their First Amendment rights and disseminating hostile speech. *Davis*, 554 U.S. at 739-40. The government cannot create a drag on the exercise of First Amendment rights by undercutting a candidate's purpose for speaking in order to equalize electoral opportunities. *Id.* The government cannot single out disfavored speakers for value-laden content-based speech regulation. *Citizens United*, 130 S.Ct. at 898-99, 908. And the right to speak freely about electoral politics cannot be held hostage to dueling expert witnesses and years of complex litigation. *Id.* at 891, 896. Arizona's matching funds system violates all of these principles; and its multipronged assault on freedom of speech has had severe real world consequences.

2. There is no record evidence of any traditional candidate or any independent group romping through an Arizona election uninhibited and unaffected by the threat of triggering matching funds. To the contrary, "[f]irst time candidates, veteran candidates, sophisticated independent expenditure committees and even a member of the CCEC all confirmed in their interviews or testimony that the matching funds component of the Clean Election[s] Act created a drag or 'chilling effect' on their campaign fundraising and expenditures that tended to restrict and delay campaign fundraising and spending." 10-239PA231. Despite this fact, Respondents have failed to show that imposing the speech burden of triggered matching funds substantially or directly advances any governmental interest, compelling or otherwise, in a

reasonably or narrowly tailored manner. Far from advancing anticorruption purposes, the only real explanation for Arizona's matching funds system is that it is chiefly a comprehensive effort by the government to manipulate electoral opportunities.

1. Matching funds trigger strict scrutiny under *Davis*.

Respondents have not asked the Court to reconsider and overturn *Davis*. Instead, by tallying up the number of times the Court mentioned "asymmetrical" or "discriminatory" contribution limits, Respondents essentially contend that the rationale and holding of *Davis* is confined to the Millionaire's Amendment as a special case of impermissible speech regulation. CEI Br. 25. But the rationale underpinning the result reached in *Davis* cannot logically be confined to just striking down the Millionaire's Amendment.

The "unprecedented penalty" that concerned the Court in *Davis* was not the intrinsic unfairness of self-financed millionaire candidates being unable to raise funds from third parties on equal terms as their donor-financed opponents. The Court, after all, did not reach any equal protection claim in rendering its decision. *Davis*, 554 U.S. at 744 n.9. Rather, the "unprecedented penalty" that concerned the Court consisted of causing Jack Davis' campaign spending to give his opponent a "fundraising advantage," thereby forcing him to "help disseminate hostile speech." *Id.* at 738-39.

Underpinning the outcome of *Davis* was the Court's recognition that in the zero-sum "competitive context of electoral politics," one candidate's gain is the other candidate's loss. *Id.* at 739. By undermining the competitive purpose of campaign spending, the Millionaire's Amendment imposed a "drag" on the unfettered exercise of First Amendment rights. By this standard, Arizona's matching funds system is clearly more burdensome on speech than the Millionaire's Amendment.

Arizona's guarantee that government subsidies will be given to participating candidates imposes a far more onerous penalty than the mere threat an opponent might raise more campaign money in asymmetrical increments. It gives participating candidates the tangible fundraising advantage of free money and even more directly causes the dissemination of hostile speech. The resulting drag on the exercise of First Amendment rights created by the *certainty* of triggering government subsidies is more speech-inhibiting than the drag created by the mere *possibility* of successfully hustling for third party contributions. This obvious point was even recognized by the Solicitor General during oral arguments in *Davis*, who defended the Millionaire's Amendment while conceding, "if they went further and basically said we're going to give you public financing if your opponent self-finances, and we're going to give you two dollars for every dollar that your opponent self-finances, I think at that point as a practical matter the regime would operate as a ban on – as a cap, just like this Court

held in *Buckley*." *Davis v. Federal Election Comm'n*, 2008 U.S. Trans. LEXIS 40 *39 (April 22, 2008).

A. Triggered matching funds do not impose a permissible "strategic" choice.

Nevertheless, Respondents still advance the Ninth Circuit's claim that triggered matching funds impose only an insubstantial "strategic" choice on traditional candidates and independent groups. CEI Br. 16. But the choices traditional candidates and independent groups make under the threat of triggering matching funds are no more "strategic" than the choices made by citizens under the threat of fines for illegal political activity. As chilling effect doctrine illustrates abundantly, a regulatory regime is not shielded from challenge under the First Amendment if, instead of being physically silenced, people are allowed to "strategically" curtail their speech based on an assessment of the risks and rewards imposed by the law. McComish Br. 53-57; Wyoming Liberty Br. 17-35.

B. The choices made by participating candidates do not justify triggered matching funds.

Respondents also claim that the purportedly "voluntary" nature of Arizona's matching funds system, and the speech limits assumed by participating candidates, wash-out any cognizable burden on traditional candidates. CCEC Br. 29. But as emphasized in *Davis*, 554 U.S. at 739, and *Citizens United*, 130

S.Ct. at 896, individuals and groups are entitled to a baseline of freedom from governmental interference with the unfettered exercise of First Amendment rights. A participating candidate's choice to take government money in exchange for agreeing to various spending and fundraising limits cannot justify imposing the burden of triggered matching funds on traditional candidates and independent groups, who are entitled to be left alone.

C. Triggered matching funds are not like symmetrically elevated contribution limits.

Finally, Respondents claim Arizona's system is saved by dicta in *Davis* that the First Amendment would not be offended by a system that would trigger symmetrically elevated contribution limits for all competing candidates. CEI Br. 26. But while it is virtually tautological that freedom of speech could not be violated by a hypothetical system that would evenhandedly relax government speech restraints, Arizona's matching funds system simply does *not* evenhandedly relax government speech restraints. Moreover, unlike the hypothetical system contemplated in *Davis*, Arizona's matching funds system does not confront candidates with the prospect of their speech generating *freer* speech by *all* participants in an electoral contest that is *not* skewed by the government to favor some candidates over others; rather, Arizona's system wrongfully threatens traditional candidates with the prospect of helping to

disseminate disproportionate *government-subsidized* speech by participating candidates in an electoral contest that has been manipulated to equalize electoral opportunities. In short, it is a complete *non-sequitur* to analogize Arizona's matching funds regime to a system that would trigger symmetrically elevated contribution limits for all competing candidates.

II. Matching funds trigger strict scrutiny because the system violates principles of speaker autonomy.

Respondents contend that Arizona's matching funds system does not offend the principles of speaker autonomy applied in *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Calif.*, 475 U.S. 1 (1986), arguing that the rule against forcing people "to help disseminate hostile speech" only applies to circumstances of forced association, forced direct subsidization of private speech, forced access to private property, or interference with editorial control. CEI Br. 37-38; CCEC Br. 32-35. But even if dicta in prior cases could be read as limiting *Pacific Gas & Elec. Co.* to these narrow circumstances, *Davis* has clarified that this interpretation of the law is incorrect. In striking down the Millionaire's Amendment, *Davis* applied *Pacific Gas & Elec. Co.* even though Jack Davis was not forced to associate with his opponents, give them access to his property, personally subsidize their fundraising, or give them editorial control over his messaging. It was sufficient that the Millionaire's Amendment forced Davis "to help disseminate hostile

speech" when he exercised his First Amendment rights. *Davis*, 554 U.S. at 739. Following *Pacific Gas & Electric* and *Davis*, strict scrutiny must be applied to Arizona's system for the same reasons.

III. Matching funds trigger strict scrutiny because the system enforces value-laden speaker and content-based speech regulation.

Respondents contend that Arizona's matching funds system does not trigger strict scrutiny because it does not enforce a governmental preference for particular viewpoints. CEI Br. 32-33. But the rule requiring strict scrutiny for speaker or content-based speech regulation does not only apply to laws that enforce a governmental preference for particular viewpoints. It also applies to speech regulations that are more generally "value-laden;" i.e., prompted by governmental "animosity and distrust" of the merits of the speech regulated or the merits of what the regulated speaker would say. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 696 (1990) (Kennedy, J., dissenting). Moreover, in *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 658 (1994), the Court underscored that *Buckley v. Valeo*, 424 U.S. 1, 17 (1976), held that the rule encompasses speech regulations that are meant "to ensure that the political speech" of the targeted speaker does "not drown out the speech of others." This is because such regulations embody a value judgment by the government that there would

be something undesirable about allowing the targeted speaker's speech to stand without rebuttal. *Pacific Gas & Elec. Co.*, 475 U.S. at 12-15 (citing *Miami Herald Publishing v. Tornillo*, 418 U.S. 241, 258 (1974)).

By these standards, Arizona's matching funds system clearly enforces value-laden speaker and content-based speech regulation. First of all, Arizona's system indisputably regulates similar speech differently depending on who is speaking. For example, if a traditional candidate and a participating candidate spend money opposing the same participating candidate in the same race, only the traditional candidate will trigger matching funds. A.R.S. § 16-952(A), (B). Secondly, the CCEC must assess the content of independent expenditures before awarding matching funds because independent groups can avoid triggering matching funds in a contest between traditional and participating candidates *only if* they oppose traditional candidates. A.R.S. § 16-952(C). Thirdly, by labeling public financing "clean campaign funding" in the context of a system that castigates the "influence of special interest money," Arizona's system obviously paints a "Scarlet Letter" on private campaign financing, traditional candidates and those who would support them, reflecting a governmental judgment that disparages the legitimacy of their campaign speech. *See* A.R.S. §§ 16-940(A), 16-951. Fourthly, and finally, there is no question that triggered matching funds are designed "to ensure that the political speech" of traditional candidates and independent groups does

"not drown out the speech" of participating candidates. Arizona's matching funds system thus triggers strict scrutiny as value-laden speaker and content-based speech regulation. *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994).

IV. Matching funds cannot withstand any level of heightened scrutiny because the system is superfluous and counterproductive.

Respondents cannot carry their burden of proving that triggered matching funds advance anti-corruption purposes under any level of heightened scrutiny. McComish Br. 62-85. They have advanced no evidence to counter the sworn testimony of Clean Elections Commissioner Lori Daniels that the Clean Elections Act does not prevent actual or apparent corruption. JA661-62. Indeed, Dr. Green freely admitted he had no direct "statistical or other evidence that demonstrates" Arizona's system prevents actual or apparent corruption. Record 321(8:2-7). Moreover, Respondents have advanced no evidence to rebut Dr. Osborn's testimony that Arizona's extremely low contribution limits and extensive disclosure requirements are adequate by themselves to prevent actual or apparent corruption. 10-239PA109, 255-75; JA462-64, 474; Record 143-6(6-7), 144-4(18-21), 144-5(1-3, 7), 145-1(36:13-25, 37:1-20). Respondents have instead rested on Dr. Green's pontification that Dr. Osborn's statistical analysis was "deeply flawed." CEI Br. 45 n.13. This is despite the fact that Dr. Green ignored Dr. Osborn's *qualitative* analysis and deliberately "closed his eyes" to reading Dr. Osborn's supporting

doctoral dissertation. Record 357(17:12-14, 23:5-25, 24:2-22, 27:23-25, 28:1-24, 38:10-25, 39:1-7, 43:6-10).

Not even the sliding scale applied in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), countenances such complete evidentiary abdication. It is simply not settled law that public financing in any form and under all circumstances always prevents actual or apparent *quid pro quo* corruption. To the contrary, even Justices who favor campaign finance regulation have recognized that, depending on the circumstances, public financing can itself enhance "the danger of real or perceived corruption." *See, e.g., Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 516-17 (1985) (White, J., dissenting). In the context of Arizona's rigorous system of campaign finance regulation, Respondents' notion that public financing in the form of triggered matching funds "is a direct effort to fight corruption" is completely implausible. *Compare* CCEC Br. 55 *with* 10-239PA264-70.

The bottom line is that triggered matching funds are superfluous because there is no significant risk of actual or apparent *quid pro quo* corruption from private campaign financing in Arizona. 10-239PA264-70. In constant dollars, Arizona's current $410 legislative and $840 statewide contribution limits are between one-tenth and one-fifth of the limits that were upheld in *Buckley* as preventing actual or apparent corruption.[2]

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[2] Adjusted for inflation, a $1000 contribution limit in 1974 would be a $4,467.00 contribution limit today. *See* Bureau of

(Continued on following page)

All campaign expenditures and contributions are fully disclosed. And bundling of private contributions is comprehensively regulated a) by an aggregate cap on political committee contributions, b) by requiring organized efforts to pool contributions to register as political committees, which entails a vast array of disclosure requirements, and c) by a general prohibition on intentional efforts to circumvent contribution limits. *See* A.R.S. §§ 16-901(19), 16-902.01, 16-905(D)(6); 1990 Ariz. Op. Atty Gen. 121. The Court has never held that public financing prevents actual or apparent corruption in a system, like Arizona's, that permits only *tiny*, fully disclosed, heavily regulated private campaign contributions. Indeed, Arizona's matching funds system is counterproductive because, unlike lump sum public financing, triggered matching funds are easily rendered the functional equivalent of unlimited and undisclosed private contributions through various deceptive gaming strategies.

Dr. Osborn testified unequivocally based on his extensive experience as a professional campaign consultant that gaming strategies are routinely used and will continue to be used because of the incentives created by triggered matching funds. 10-239PA270-75. Even Dr. Green admitted that "the Arizona Clean Elections System effectively allows private individuals to bypass candidate contribution limits by running as

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Labor Statistics Inflation Calculator, http://146.142.4.24/cgi-bin/cpicalc.pl?cost1=1000&year1=1974&year2=2011 (last visited March 13, 2011).

a self-financed traditional candidate who is teamed with participating candidates." Record 321(12:13-17, 13:1). Moreover, it is undisputed that a) self-financed traditional candidate Sam George deliberately triggered $1,000,000 to his teamed participating candidates, b) Republican candidates for the same office boasted of a similar strategy, and c) hundreds of signs were posted during the 2008 election cycle using the tactic of reverse targeting. McComish Br. 71-75.

Although Respondents trumpet administrative rules that purportedly restrict overt candidate teaming, such regulations only illustrate the severity of the problem. The rules against overt teaming cannot prevent would-be donors to participating candidates from running as "placeholder" traditional candidates in order to trigger matching funds to their *covertly* teamed (or merely favored) participating candidates. Likewise, rules against overt teaming cannot stop donors or independent groups from contributing to traditional candidates in order to trigger matching funds to favored participating candidates. And such rules cannot stop independent groups from using reverse targeting to trigger matching funds to preferred competing participating candidates.

Until the government develops the capacity to read minds, triggered matching funds will inevitably be gamed to serve deceptively as the functional equivalent of unregulated private campaign financing. 10-239PA270-71. And to the very extent that unregulated private campaign financing is asserted to create actual or apparent corruption, so will

triggered matching funds. Consequently, Arizona's matching funds system fails any level of heightened scrutiny because it is both superfluous and counterproductive.

V. Matching funds cannot withstand strict scrutiny because lump sum public financing is less restrictive and feasible.

Respondents have failed to carry their burden of proving that lump sum public financing is not a feasible less restrictive alternative to triggered matching funds. McComish Br. 83-86. Lump sum public financing does not link the exercise of First Amendment rights by traditional candidates and independent groups to the dissemination of hostile speech. It is therefore plausible to conclude that lump sum public financing is less burdensome than an equivalent amount of triggered matching funds. Respondents have advanced no evidence showing otherwise. Likewise, nothing supports the claim that replacing matching funds with lump sum public financing "would make the Act prohibitively expensive." CEI Br. 55. The Court can take judicial notice that the CCEC has continuously returned tens of millions of dollars to the general fund for years. *Compare* McComish Br. 85 n.5 *with Crawford v. Marion County Election Bd.*, 553 U.S. 181, 199 (2008) (relying on "evidence in the record and facts of which we may take judicial notice").

But even if the CCEC's resources were more limited than its press release would suggest, Respondents

advance a straw man argument in contending that there is not enough money to disburse lump sum public financing equal to triple the initial disbursement of clean campaign funds. CEI Br. 54. Respondents have advanced no evidence that triple the initial disbursement of clean campaign funding is needed for a viable system of public financing – especially when nearly 50% of races in the 2010 election cycle were won by participating candidates with only the initial disbursement. McComish Br. 85 n.5.

Respondents' argument that a single lump sum amount would underfund or overfund candidates due to the disparity of campaign spending from legislative district to district is also a straw man. Lump sum public financing does not have to be "one size fits all." To deal with the range of spending levels that vary from legislative district to district, a carefully calibrated system of lump sum financing could simply target average spending levels in each district using prior election data adjusted by population and inflation. Given that Arizona's matching funds system has overfunded participating candidates as much as 136% more than traditional candidates on average, there is no reason to believe that Arizona's system of matching funds is intrinsically better calibrated than lump sum public financing. 10-239PA290-92. Because Respondents have failed to show that lump sum public financing is not a feasible less restrictive alternative to triggered matching funds, Arizona's matching funds system fails strict scrutiny.

VI. Matching funds fail any level of heightened scrutiny because the system is chiefly interested in equalizing electoral opportunities.

Respondents claim that Petitioners are plumbing the motives of the drafters of Arizona's matching funds system in claiming that it is chiefly interested in equalizing electoral opportunities. CEI Br. 40; CCEC Br. 47-48. The converse is true. Petitioners are merely taking Arizona law at its word. It is Respondents who urge the Court to disregard the text, context and enforcement of the law in order to adopt the implausible position Arizona's system was primarily motivated by the goal of preventing *quid pro quo* corruption stemming from private campaign corruption.

The Clean Elections Act's chief interest in rebalancing influence and resources among competing candidates and interest groups is clear and unambiguous. A.R.S. § 16-940(A) specifically describes the purpose of the system as to diminish "the influence of special interest money." A.R.S. § 16-940(B)(2), (4), (7) criticizes the prior system as having given "incumbents an unhealthy advantage over challengers," "suppresse[d] the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests," and driven "up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding." A.R.S. § 16-952 specifically describes Arizona's matching funds provision as "Equal Funding of Candidates." Triggered

matching funds are repeatedly described by the CCEC in its rules as "equalizing funds." *CCEC Admin. Rules* R2-20-113; JA885. And the CCEC has repeatedly taken the official position that the goal of Arizona's system is to "level the playing field." JA308, 457, 840, 854-55.

Of course, Respondents essentially contend that this verbiage is mere puffery meant to encourage voter participation and describe the goal of promoting competitive elections. CEI Br. 60; CCEC Br. 13-15, 49-50. But whether an election is competitive is necessarily judged in relation to the opportunity to become elected. By claiming that Arizona's matching funds system is aimed at generating competitive elections or "expanding" electoral opportunities, Respondents are necessarily admitting that the system is aimed at manipulating electoral opportunities. *Cf. Scott v. Roberts*, 612 F.3d 1279, 1293 (11th Cir. 2010). Whether or not government manipulation of electoral opportunities to generate competitive elections could indirectly serve anticorruption purposes, the Court has long held fast to the bright line rule that the First Amendment does not condone such governmental intervention into electoral contests. McComish Br. 64-65. The risks associated with the government burdening speech in order to pick winners and losers are simply too great. *Citizens United*, 130 S.Ct. at 904-05; *Davis*, 554 U.S. at 742-43.

But it should still be emphasized that the text of the Clean Elections Act only contains vague allusions to the sort of appearances and influences that the

Court has already rejected as the equivalent of actual or apparent *quid pro quo* corruption in *Citizens United*. *Compare* A.R.S. § 16-940(A), (B) *with Citizens United*, 130 S.Ct. at 909-12. The Act makes no reference to AzScam or "corruption" at all. These omissions constitute substantial evidence that Arizona's matching funds system has little, if anything, to do with preventing actual or apparent *quid pro quo* corruption.

Significantly, the bipartisan legislative committee convened to recommend reforms to prevent another AzScam specifically rejected public financing in 1991. JA116-21; Record 352(2-6). Instead, it recommended, and Arizona adopted in 1993, new provisions and definitional changes that closed loopholes in Arizona's system of exceedingly low contribution limits and comprehensive campaign finance disclosures. *Id.* Thus, it makes perfect textual *and* contextual sense to conclude that Arizona's matching funds system is *not* "chiefly interested" in preventing actual or apparent *quid pro quo* corruption – it was overlaid on a system of private campaign finance regulation that addressed that goal five years earlier.

Not surprisingly, Respondents ultimately retreat to the Ninth Circuit's fallback position that the goal of "leveling the playing field" evidences only one interest among many others, which cannot alone condemn Arizona's system. But whatever diversity of interests Arizona's system purportedly serves, the Court is still duty-bound by the First and Fourteenth Amendments to assess whether the system is chiefly interested in equalizing electoral opportunities

through resource or influence leveling. *Davis*, 554 U.S. at 740 n.7. In so doing, the Court simply cannot ignore the clear implications of A.R.S. § 16-954(F), which Respondents fail to address in their briefings.

When inadequate public financing exists to pay matching funds, A.R.S. § 16-954(F) transforms the matching funds trigger into a mechanism that permits participating candidates to engage in private campaign financing to match fundraising and expenditures by traditional candidates and independent groups dollar-for-dollar. This provision of Arizona's law enables participating candidates to obtain up to twice as much private campaign financing as public financing. In other words, when the goal of keeping candidates "clean" clashes with the goal of equalizing electoral opportunities, the former yields to the latter. There could not be a more clear textual basis for concluding Arizona's matching funds system is chiefly interested in equalizing electoral opportunities. The lingering atmospherics of the decades-old AzScam scandal cannot salvage this patently unconstitutional policy choice.

Still, from a certain perspective, Respondents are right. The text of the law *is* misleading. Arizona's matching funds system does not merely equalize influence and resources among candidates and interest groups. Some candidates and interest groups are more equal than others. Under the guise of "leveling the playing field" and "Equal Funding for Candidates," Arizona's system typically unleashes a deluge of resources in favor of participating candidates.

McComish Br. 29-32, 67-68. The electoral playing field is "leveled up" to create an uphill contest for traditional candidates and independent groups who do anything other than oppose traditional candidates.

The term "equalizing funds" and the phrase "leveling the playing field" are euphemistic. They actually denote a system that comprehensively manipulates the incentives underpinning campaign fundraising and spending to undermine the electoral opportunities of traditional candidates. Arizona's system can be seen as "equalizing" electoral opportunities and "leveling the playing field" only through the eyes of a zealot who believes that disproportionate funding of participating candidates and incentivizing independent groups to oppose traditional candidates is necessary to equalize the disproportionate "voices and influence" of "wealthy special interests." Such an "equalizing" purpose is obviously contrary to the principles articulated and enforced in *Citizens United* and *Davis*. Regardless of whether the Court applies strict or intermediate scrutiny, Arizona's matching funds system must be struck down under the First Amendment for being chiefly interested in manipulating electoral opportunities under the banner of egalitarianism. *Citizens United*, 130 S.Ct. at 904-05; *Davis*, 554 U.S. at 740 n.7, 742-43.

CONCLUSION

Respondents deny that triggered matching funds chiefly aim to equalize resources and electoral opportunities, even though A.R.S. § 16-952 is plainly titled "Equal Funding of Candidates." They insist that Arizona's system has nothing to do with equalizing influence, despite A.R.S. § 16-940 aspiring to diminish "the influence of special interest money." They contend that no one is compelled to help disseminate hostile speech as a condition of speaking, while admitting that equalizing funds are triggered by continuous, compulsory disclosures of campaign financing by traditional candidates. They dispute the existence of a chilling effect from the threat of triggered matching funds, while admitting that campaign consultants advise their clients to delay or cease their campaign spending and fundraising to avoid that threat. They deny that Arizona's "Clean Elections" system engages in content-based discrimination against traditional candidates, even though independent groups can only avoid triggering matching funds to competing publicly-financed candidates by *opposing* traditional candidates. They claim gaming of the system is only hypothetical while trumpeting efforts to restrict gaming of the system. Finally, they claim the purpose of triggered matching funds is really to prevent corruption even though that purpose appears nowhere among the Clean Elections Act's verbose findings, and a bipartisan legislative committee explicitly *rejected* public financing as the remedy for AzScam *seven years* before Arizona's system became law.

In essence, the opposition asks, "Who are you going to believe, me, or your own eyes?" The answer should be as obvious as when Chicolini Marx posed the question in *Duck Soup*. The case for sustaining Arizona's matching funds system under *Davis* and *Citizens United* is just not credible. Accordingly, the Court should vindicate the First and Fourteenth Amendments by restoring the district court's permanent injunction on A.R.S. § 16-952, together with appropriate ancillary relief as previously requested.

Respectfully submitted,

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